

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: : Docket #18-cv-04814
ROUVIERE, et al., : LJL-SDA
Plaintiffs, :
- against - :
DEPUY ORTHOPAEDICS, INC., et al., : New York, New York
April 28, 2021
Defendants. : TELEPHONE CONFERENCE
----- :

PROCEEDINGS BEFORE
THE HONORABLE JUDGE STEWART D. AARON,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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INDEX

E X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re-Direct</u>	<u>Re-Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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None

1 PROCEEDINGS

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2 HONORABLE STEWART D. AARON (THE COURT): Good
3 afternoon. This is Magistrate Judge Aaron. This is the
4 matter Rouviere against Howmedica Osteonics Corp. et al,
5 18-cv-4714. This line is being recorded. If I could have
6 the parties identify themselves, please, starting with the
7 plaintiffs?

8 MS. MELISSA VISCONTI: Good afternoon, your Honor.
9 Melissa Damian Visconti and Andre Rouviere on behalf of the
10 plaintiffs. Ms. Rouviere, one of the plaintiffs, is also
11 on the line.

12 MR. PAUL ASFENDIS: Good afternoon, Paul Asfendis
13 for defendant, Howmedica Osteonics Corp.

14 MR. JOEL T. LARSON, JR.: Good afternoon. This is
15 J.T. Larson from Barnes & Thornburg on behalf of Depuy
16 Orthopaedics, Inc.

17 MR. JOSEPH G. EATON: Joe Eaton on behalf of Depuy
18 Orthopaedics, Inc.

19 THE COURT: Thank you. Good afternoon.

20 The purpose of this call is to address the
21 plaintiff's motion filed on March the 31st at ECF 287. In
22 that motion plaintiffs are seeking to modify the Scheduling
23 Order to permit the submission of supplemental expert
24 reports and also to sanction Howmedica for alleged
25 discovery misconduct. I have reviewed the parties'

1 PROCEEDINGS

5

2 submission, and I have a few questions for the plaintiffs,
3 a few questions for the defendants, and then I was going to
4 open the floor up, first, to the plaintiffs for them to
5 waive any issues they wish to raise or emphasize any issues
6 they wish to emphasize, again, keeping in mind that I have
7 read everything that's been submitted. And then I'll open
8 the floor to each of the defendants for whatever comments
9 they wish to make with the same understanding that they --
10 no one should feel like they need to say something that's
11 in the papers because I've reviewed everything.

12 So first for the plaintiffs -- and every time I
13 hear a beep that it sounds like somebody is leaving the
14 line, I just want to be sure that -- Ms. Visconti, are you
15 still on with us?

16 MS. VISCONTI: I am, yes.

17 THE COURT: All right, and I still have counsel
18 for both defendants still on the line, am I right?

19 SEVERAL: Yes, your Honor.

20 THE COURT: Okay, so for the plaintiffs, are you
21 claiming that Howmedica acted intentionally in withholding
22 material information from you?

23 MS. VISCONTI: Well, they certainly knew they had
24 the information, and they certainly intentionally did not
25 tell us. If you're asking whether I am arguing that they

1 PROCEEDINGS

6

2 did that for some nefarious purpose, I simply just can't
3 get into their heads. But did they knowingly obtain
4 materials without telling us and knowingly hold onto them
5 for over a year without telling the plaintiff? Yes,
6 certainly.

7 Is that your question? I'm not sure I -- go
8 ahead.

9 THE COURT: Yes. And I'm going to obviously ask a
10 similar question to Howmedica. But before I do that, are
11 you claiming that Depuy did anything wrong here, whether
12 intentional or not, vis-à-vis these slides, these recuts?

13 MS. VISCONTI: So I don't know that Depuy
14 intentionally did anything wrong here. It looks -- again,
15 I don't know what's in their heads, but they should have
16 informed Howmedica, when they provided Howmedica a copy of
17 their authorization, that there was an obligation to
18 provide everyone a copy of whatever it was that they
19 obtained. Was that intentional or an oversight? I
20 honestly -- that's not really the point that we're trying
21 to make here. I don't know.

22 THE COURT: Well, so Depuy, when they received the
23 information from Baptist Hospital, they immediately sent a
24 link to both Mr. Rouviere as well as counsel for Howmedica.
25 So I guess I'm having difficulty understanding -- and maybe

1 PROCEEDINGS

7

2 you can enlighten me -- as to why it is that you think
3 Depuy is at fault.

4 MS. VISCONTI: Okay, wait. I want to make sure
5 that I'm understanding here. So, really, our argument is
6 that HOC is at fault here, right, that HOC, who used
7 Depuy's authorization or Depuy's law firm's authorization
8 to obtain these records. So, really, what we're saying is
9 if anyone's at fault here, it's HOC.

10 Now, Depuy permitted it to happen. I don't know
11 that Depuy understood the extent of what happened. It is
12 Depuy's claim -- and I have absolutely no reason to believe
13 that it's not true -- that they did not know that HOC had
14 actually obtained materials. And I believe what you're
15 referring to is, yes, at various points the Rouvieres were
16 made aware, certainly, of correspondence with the
17 hospitals. But on the particular correspondence we're
18 talking about that's relevant here, they were -- what it
19 tells us is recuts were available, right, not HOC has
20 requested and obtained three slides, you know, on such-and-
21 such a date and they were sent to this law firm. That,
22 nobody knows. Depuy doesn't claim that they knew it, we
23 certainly didn't know it. The only thing we possibly could
24 have known, based on the documents that HOC is submitting,
25 is there were -- recuts could have been requested, and you

1 PROCEEDINGS

8

2 could have paid \$35 to get them.

3 THE COURT: And the plaintiffs never asked for
4 them, right, from Baptist Hospital?

5 MS. VISCONTI: The plaintiffs did not request --
6 we didn't know -- correct, we did not ask for more recuts
7 to be done. The plaintiffs were aware of the original
8 slides. Those were the first cuts. All the plaintiffs
9 were aware was that there was this block of tissue that
10 remained there. And, yes, it's -- of course, everyone
11 knows it's possible or should have known that it was
12 possible to go back and say, "Hey, you know, we think that
13 there's a need for more cuts." We didn't ask for those
14 because we had three slides. We were not aware that any
15 others had been done, and we didn't initiate a process to
16 get more slides.

17 THE COURT: But plaintiffs were aware that they
18 could have, is that fair?

19 MS. VISCONTI: Sure. I mean, were they actually
20 aware? You know, I think at a certain point they were,
21 sure. They're not denying that they should have known that
22 there was the possibility to go back and ask for more
23 recuts if they wanted them.

24 THE COURT: Okay. So for the defendants -- and
25 I'll leave it to, you know, whether -- Howmedica or Depuy

1 PROCEEDINGS

9

2 or perhaps both can answer this question for me, because
3 I've been studying the events of late October 2019 and
4 early November 2019. So piecing together what happened
5 here, a paralegal from Gibbons P.C., if I'm pronouncing her
6 name correctly, Sheva Konsari, on October the 28th, 2019,
7 sends a fax to the hospital, Baptist Hospital, and says,
8 "Thank you for speaking with me on Friday. As per our
9 conversation, attached is an authorization to obtain tissue
10 samples from the 11/11/16 and 2/16/17 surgeries. Please
11 let me know if you need anything else." And that fax,
12 which is attached as part of ECF 287-1, the first page of
13 it in the upper left-hand corner says page 1 of 4. And
14 then as part of ECF 287-1, there's only three pages from
15 that fax that are included.

16 And then what comes next that's relevant to the
17 issue before me is that on October 31st, 2019, three days
18 later, Baptist Hospital doesn't send a fax to Sheva Konsari
19 but rather responds directly to Barnes & Thornburg, who's
20 counsel for Depuy, and says, "Further to your fax dated
21 October 28, 2019," and it wasn't Depuy's fax or Barnes &
22 Thornburg's fax; it was in fact Gibbons' fax, it was
23 somebody from Gibbons.

24 So piecing it together, what I surmise is that the
25 missing page from that fax was the May 2019 letter that was

1 PROCEEDINGS 10

2 sent -- that existed from Barnes & Thornburg; it's at

3 ECF 291-2 at page 10. There's a To Whom It May Concern

4 letter from Laura Wolverton, a paralegal at Barnes &

5 Thornburg, to the Keeper of Records at Baptist Hospital.

6 And the person at Baptist Hospital looked at who had

7 sent -- under whose cover the authorization was sent and

8 therefore sent the October 31 response, again, not to

9 Howmedica's counsel but instead to Depuy's counsel. I'd

10 like the lawyers for both Howmedica and Depuy to comment on

11 what I just said and tell me whether they think I got it

12 right; and if not, how I got it wrong. And, again, I leave

13 it to whoever wants to speak first.

14 MR. ASFENDIS: I suppose I'll go first. This is
15 Paul Asfendis for Howmedica. And so thanks for the
16 opportunity. And I guess just to your point, also, because
17 it's about this issue, the plaintiffs have made an
18 allegation here that we have done something. And
19 Ms. Visconti says she doesn't know whether it's nefarious.
20 But if you read their papers, they say it's nefarious, and
21 they say that we did something that was underhanded. And,
22 Judge, it is complete, completely, categorically false.

23 And so what I also want to mention is plaintiffs,
24 when they represented in their reply papers that we,
25 Howmedica, somehow went rogue and did this and didn't even

1 PROCEEDINGS

11

2 tell Depuy we were doing it, that was known to be false by
3 the plaintiffs when they said it because there's an earlier
4 email from Depuy's counsel to the plaintiffs' counsel
5 explaining that, yes, we knew they were using the
6 authorization to get records. We might not have known or
7 confirmed that they finally got those slides, the pathology
8 slides, but we knew they were using it.

9 And, you know, I don't know how much -- there is a
10 history here -- I don't know how much you want to hear;
11 but, I guess just relevant to what you had said, this was
12 not something where we just went on our own and reached
13 out. We had said, you know, we think we should probably
14 get the pathology slides, so our paralegal contacted
15 Ms. Wolverton and said, you know, would you like us to make
16 the reach-out, because we'd like to get the slides. And
17 every step of the way, every communication with Baptist
18 Hospital was -- they were kept apprised.

19 Now, you know, so as far as the actual confirming,
20 yes, they arrived at our office, no, that did not happen.
21 But there's nothing underhanded about that. We just --
22 this was an expedient way to get the pathology slides
23 because we didn't yet have an authorization from the
24 plaintiffs. We had -- there was no dispute that we were
25 entitled to those same records, to the same slides. There

1 PROCEEDINGS

12

2 was never an objection to providing the authorization. I
3 think there was a miscommunication about getting that
4 authorization to us.

5 I just heard a tone, so I don't know if somebody
6 dropped off, but unless I'm --

7 THE COURT: Well, let's just, again, just to be
8 sure, do I still have plaintiffs' counsel on the line?

9 MS. VISCONTI: Yes, sir.

10 MR. ANDRE ROUVIERE: Yes, sir.

11 THE COURT: All right, and do we still have
12 Depuy's counsel on the line?

13 MR. LARSON: Yes, your Honor, yes.

14 THE COURT: Okay. So please continue.

15 MR. ASFENDIS: Okay, and so basically, there's
16 this history here. And there's no question this is not a
17 privacy issue. It never has been about privacy or HIPAA,
18 which was mentioned in the latest, in the reply brief,
19 which is a -- they mention a regulation that provides to
20 healthcare providers, not to defendants in a litigation.
21 But plaintiffs themselves sent me personally a flash drive
22 with thousands [indiscernible] records on them, medical
23 records, a lot of them duplicative of the records we're
24 talking about from Baptist Hospital.

25 And so there's no issue here as far as privacy. I

1 PROCEEDINGS 13
2 don't believe there is an issue, that it should be an issue
3 as far as what Depuy knew or did not know. I only mention
4 this because you asked the question and because the
5 plaintiffs have made this allegation that we somehow went
6 on our own and did this and went rogue. And it is not
7 true.

8 THE COURT: Okay. I --

9 MR. ASFENDIS: So I have a lot more to --

10 THE COURT: No, I just want to go back to my --
11 and I heard everything you said, and I want to go back to
12 my specific question; and that is do you believe that my
13 surmise that the fourth page of that fax that was sent to
14 Baptist Hospital enclosing the authorization had with it
15 the May 19 letter, and therefore, that's why Baptist
16 Hospital sent the response to Ms. Wolverton, who was the
17 one who signed that transmittal letter?

18 MR. ASFENDIS: Oh, yes, I believe --

19 THE COURT: And --

20 MR. ASFENDIS: -- that is true. Yes -- I'm sorry.

21 THE COURT: Go ahead.

22 MR. ASFENDIS: I was going to say I believe that
23 is accurate. I think when our -- you know, the paralegal
24 at my office sends the authorization, she sent it with the
25 initial -- with Depuy's letter. We had asked Ms. Wolverton

1 PROCEEDINGS

14

2 to send us the letter and the authorization because Baptist
3 wanted it.

4 THE COURT: Okay. And let me ask Depuy's counsel:
5 Do you have a similar belief or understanding as to that's
6 what transpired?

7 MR. LARSON: Your Honor, to answer your question
8 regarding the one-page directly, I do believe that that was
9 Ms. Wolverton, the May 10th or May -- release that was that
10 one page that's missing from that document. I don't have a
11 broader response to everything that Mr. Asfendis discussed,
12 but I'm happy to discuss it, if you'd like.

13 THE COURT: Well, I don't think so. Obviously,
14 I'm happy to hear whatever else each party would like to
15 say. So I'm going to give each party an opportunity to do
16 that.

17 But let me ask Howmedica this question. Exactly
18 why did you not produce the recut slides, the ones that
19 were received after you got -- you got this November 7,
20 2019, invoice that said path \$105, and then it says, "The
21 slides will be released on receipt of your check in the
22 amount of \$105." That was sent to Sheva Konsari. So you
23 then got the recuts, and I know they were kept somewhere in
24 the offices of Gibbons. Please state for me, clarify for
25 me exactly why you did not produce those recut slides to

1 PROCEEDINGS

15

2 the plaintiffs when you received them -- or to Depuy, for
3 that matter.

4 MR. ASFENDIS: Yes, Judge, it honestly didn't
5 cross my mind because there's no obligation that I'm aware
6 of to disclose that or to produce them because all the
7 parties were aware that there was this -- the Baptist, you
8 know, said here's how much the slides cost and you can get
9 them. Any party could have gotten them. We know
10 plaintiffs got their own set. They got the originals and
11 certainly didn't supplement anything or disclose anything
12 until they decided to use them and we found out in their
13 expert reports. And so that's why. There was no
14 obligation that I was aware of to do it. We were just
15 covering our bases, getting the slides because it's always
16 been our practice to just -- you know, if there's something
17 there, you get it in case of need. I didn't know that it
18 would be needed. I frankly didn't, you know, think it was
19 likely that it would be; but why not get the slides? And
20 so that's why we didn't disclose them because I was not
21 aware of no obligation to do so.

22 Even Depuy's agreement with the plaintiff, I know
23 Depuy was circulating, of course, records anytime they came
24 in, the paper records, they were giving courtesy copies.
25 And to me, that's a lot different because we knew you can't

1 PROCEEDINGS

16

2 give a courtesy copy of slides. You can just make the
3 parties aware that they're available. Anybody can get
4 them. We got our own. We understood that they were
5 duplicates. Plaintiffs had the originals; they certainly
6 didn't say anything to anybody. And that was it. And so
7 that's why, Judge; it was nothing certainly nefarious, not
8 trying to hide anything. There was no point to. We
9 certainly hadn't made any -- had been reviewed or had any
10 decision or considered using them in the case. It was just
11 getting them to have them in case of need at some point.

12 THE COURT: So Ms. Konsari received these slides
13 and files them away. Like, were these -- did she come and
14 say, "Hey, I got these slides; what should I do with them?"
15 Or what --

16 MR. ASFENDIS: I think --

17 THE COURT: -- what do you remember about what
18 transpired upon receipt by Ms. Konsari of these slides?

19 MR. ASFENDIS: I think that was it. My
20 recollection is that, that basically, hey, the slides came
21 in. I said okay, you know, we'll keep them where you
22 normally keep anything, in a secure cabinet by her desk.
23 And, I mean, honestly, that was it. That was what
24 transpired, and I didn't give it much thought, if at all,
25 frankly, after that.

1 PROCEEDINGS

17

2 Again, we understood -- we had the understanding
3 that we had just obtained duplicate slides that, you know,
4 weren't necessarily going to be used or just it was a
5 matter of covering bases to get everything and that there
6 was no obligation to tell anybody. I didn't expect the
7 plaintiffs to tell us that they had the originals. I'm not
8 saying that they did anything wrong by doing it. I'm only
9 pointing out the fact that they didn't tell us is not that
10 they did something wrong but it's that they did the same
11 thing. So that's why I'm having a little trouble here, you
12 know. I'm definitely being accused by the plaintiffs of
13 having done something underhanded or not disclosed. Well,
14 neither did they. And that's okay because I don't think
15 they had an obligation to do it. And they had the
16 originals, Judge. So that's, you know, a long-winded
17 answer, but I hope that answers your question.

18 THE COURT: Okay. So let me ask plaintiffs'
19 counsel, Ms. Visconti, I'm not soliciting additional
20 argument, but I did want to give each party, as I
21 indicated, an opportunity to make any -- emphasize any
22 points that they wished to emphasize. So, Ms. Visconti,
23 I'll have you go first.

24 MS. VISCONTI: Sure. Thank you, your Honor.
25 So, again, as I've said throughout our papers and

1 PROCEEDINGS

18

2 I say here again today, we're not coming in here and saying
3 this was a big conspiracy or a big plot. I don't even know
4 if it was intentional. What I'm saying is they had an
5 obligation to disclose that they had obtained these
6 tissues, and they didn't do it. Now, was it intentional?
7 Were they hiding it? Or was it negligence? At best, it's
8 negligence. Okay?

9 But I think it's important for the Court to
10 understand that, you know, you just asked, okay, when the
11 slides came in, did Ms. Konsari -- you know, but you know,
12 hey, the slides are here; I'm going to stick them in this
13 locked cabinet. And the response was most likely. Right?
14 Don't forget that while they were in possession of these
15 slides, Dr. Gannon was deposed and asked a ton of questions
16 about what specimens he had reviewed. So they're thinking,
17 right, it's out there, that there's specimens out there and
18 Dr. Gannon has reviewed them. Then there's a hearing where
19 they protest that we will not send the slides, the original
20 slides that we disclosed to them that we had because we
21 disclosed Dr. Gannon's report within, like, a week of us
22 getting them. Okay? So there's no -- we didn't get slides
23 and not tell them about them. Our, you know, the
24 plaintiffs obtained the original slides, provided them to
25 their expert, their expert prepared a report and indicated

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1 PROCEEDINGS

19

2 that he had relied on these slides and that -- he
3 discloses, right after we get the slides -- it's not like
4 we're hiding them in a drawer [indiscernible due to barking
5 dog]. Right? And as soon as he discloses them, the
6 defendants start pushing to get access to those slides.
7 And there's actually a hearing about it, about how they
8 should be able to review the same specimens that we did.

9 So, again, it was on everybody's mind that these
10 slides -- that we're having this whole discussion about
11 access to slides. How they failed to have the lightbulb go
12 off and remember that they had other slides sitting in a
13 drawer and not tell us is a little bit -- we'll just say,
14 you know, it goes to that negligence at best that I'm
15 saying.

16 I would also just make sure -- you know, you were
17 asking what -- I believe that Mr. Asfendis stated he didn't
18 think that there was any obligation to tell anybody, he
19 just didn't think of it. And that's what we're really
20 talking about in our reports here. Even if they had not
21 decided to actually use them so that they would have to be
22 disclosed in their initial disclosures, there were several
23 discovery requests that these would have fallen within.
24 They had them for a year and never updated or supplemented
25 the responses to their discovery requests to indicate that

1 PROCEEDINGS

20

2 they had them.

3 So, you know, I don't think that the issue here is
4 was there some nefarious plan to hide evidence. I think
5 the issue here is they obtained material relevant --
6 materials here and didn't tell anybody about them. I'm
7 putting aside how they went about it. You know, it isn't
8 okay to use somebody else's authorization -- but I'm
9 putting that aside. The fact is not how they got them; the
10 fact is they obtained material evidence and failed to tell
11 anybody about it. And that evidence, as it turns out,
12 happens to be, again, material; and that's really why we're
13 here.

14 We're here for two reasons. One, we want to make
15 sure that nobody's going to object if Dr. Gannon, our
16 expert, wants to opine and discuss what it is that he saw
17 in these slides. In an abundance of caution, we considered
18 that to be potentially a new opinion, which you know we're
19 sensitive about because we've already run into this issue
20 about, you know, the allegation that we disclosed expert
21 opinions after the deadline. So we want to make sure that
22 [indiscernible] can talk about and discuss and opine
23 regarding this information without objection. Does that
24 require modification of the Scheduling Order to permit them
25 to do so? We were doing that in an abundance of caution.

1 PROCEEDINGS

21

2 Both defendants claim that there's nothing different or new
3 here, so possibly what we're requesting is possibly moot
4 because -- as far as that first thing that we're
5 requesting -- because they're saying there's nothing new
6 here. So if that's the case, we should be permitted to let
7 Dr. Gannon opine regarding what he saw on these slides, and
8 then any other experts to also discuss how Dr. Gannon's
9 opinion, you know, just opine based on all of that
10 information. And if they're not going to object, again,
11 the first part of our request here may very well be moot.
12 Maybe we don't need to modify the Scheduling Order.

13 But, secondly, there is the absolute clear
14 violation of discovery obligations. The sanctions are
15 mandatory. We're here because we couldn't --

16 THE COURT: Well, let me just push back on the
17 sanctions are mandatory. So you're relying upon 37(c) (1),
18 and 37(c) (1), the mandatory part says, If a party fail --
19 and I'm not reading all of the words because I'm leaving
20 out words that aren't necessary -- if a party fails to
21 provide information as required by Rule 26(a) or (e), the
22 party is not allowed to use that information to supply
23 evidence on a motion, at a hearing or a trial unless the
24 failure was substantially justified or harmless. It then
25 goes on, in addition to or instead of this sanction, the

1 PROCEEDINGS

22

2 Court on motion after giving an opportunity to be heard, A,
3 may order payment of the reasonable expenses, including
4 attorney's fees caused by the failure -- I'm going to skip
5 B, which is informing the jury -- and, C, may impose other
6 appropriate sanctions. So where is it in Rule 37(c) that
7 it's mandatory that I sanction -- assuming you're right,
8 assuming there's been some sort of violation of the
9 rules -- that it's mandatory that I sanction Howmedica?

10 MS. VISCONTI: So, under the first provision that
11 you read of (c)(1), it is mandatory that there is a
12 sanction. Normally, that sanction would be, as you said,
13 that they would not be able to use the discovery material
14 that's at issue. The "may" part, I would submit, is if
15 that original sanction doesn't fit, if it's not a fitting
16 sanction for what happened, then the Court may, in place of
17 that original option, use monetary sanctions or some other
18 appropriate sanction.

19 What's happening here is we are not arguing that
20 because they did not disclose this evidence, they,
21 Howmedica, should not be permitted to use this evidence.
22 That is not a fitting sanction for what happened here. So
23 we are asking the Court you then can use your discretion to
24 go into, to dip into the "may" and replace the original
25 mandatory sanction with a more fitting sanction, which we

1 PROCEEDINGS 23

2 would submit would be both monetary because we're here

3 because they would not agree to just let us supplement

4 these reports and do what needed to be done as a result of

5 their discovery violations. And, frankly, you know, one

6 thing that the defendants are concerned about -- and I

7 think it's as valid concern -- we need to go back and now

8 revisit this whole -- these pending motions regarding the

9 exclusion of an expert on the grounds that the expert

10 didn't find evidence or didn't opine, you know, didn't give

11 opinions based on a lack of evidence that we now are

12 telling you are in these specimens that have been sitting

13 in that locked cabinet for a year. So there --

14 THE COURT: All right, so, Ms. Visconti, I'm going
15 to bring you back to my question. It sounds like you're in
16 agreement with me it is not mandatory that I impose
17 sanctions on Howmedica is prefatory; it is -- the word is
18 "may," I may do that but I am not required to do that. Do
19 you agree?

20 MS. VISCONTI: Not entirely, your Honor. It is
21 mandatory that sanctions are imposed; it's just that the
22 sanctions that are mandatory don't fit. So, yes, then I
23 would say it may, the Court may impose alternative
24 sanctions. So I sort of agree, but other than that
25 very first part.

1 PROCEEDINGS

24

2 THE COURT: Okay. Again, you and I may be looking
3 at different rules. It says in addition to or instead of
4 the sanction, I may impose money and other sanctions. So
5 it's "in addition to or instead of."

6 MS. VISCONTI: "Or instead of," correct. I'm
7 focusing on the "instead of," right.

8 THE COURT: Right. But it's "may." What I'm
9 quarreling with you about is you're telling me I'm required
10 to do this, and I don't see a rules-based -- how that
11 position is rules based. I'm a stickler to the rules. I
12 follow the rules; I'm a rule follower, which is good, given
13 the position I'm in, because I'm required to follow the
14 rules. And I want to follow the rules, and I'm not seeing
15 anything that makes it mandatory on me to impose sanctions
16 here. And it doesn't sound like you're citing me to
17 anything that says I'm wrong.

18 MS. VISCONTI: So I'm pulling this back up. So my
19 point is that the only mandatory part -- I think we're in
20 agreement here; we're only splitting up at the end. I
21 think we're in agreement, but under (c)(1), the party --
22 it's mandatory that the party would not be able to use the
23 information or evidence at issue unless the failure is
24 substantially justified or harmless, right. I think we
25 agree that that's a mandatory provision. I'm saying that

1 PROCEEDINGS 25

2 the "in addition to or instead of" the sanction language,

3 I'm asking the Court to interpret it as the Court has the

4 discretion to replace the sanction that is not fitting, the

5 mandatory sanction which doesn't fit. It's your --

6 absolutely your discretion to then impose an alternative

7 sanction, which is in the rest of, you know, (1)(a), right.

8 THE COURT: And I agree with you about that.

9 Again, I was just questioning the mandatory piece.

10 Okay, so what else -- obviously, again, I've read
11 your papers; I've read everyone's papers. So this is a
12 message to all of you: Don't feel you need to repeat
13 what's in your papers. But, Ms. Visconti, before I turn
14 the floor over to Howmedica, do you have anything else?

15 MS. VISCONTI: No, your Honor. Thank you. I
16 think we say it all in our papers.

17 THE COURT: Okay. So, again, Howmedica's counsel,
18 I obviously want to give you an opportunity to emphasize
19 whatever you want to emphasize. But please keep in mind
20 that I have read the papers. But go ahead.

21 MR. ASFENDIS: Okay, so I will be brief, then,
22 because some of these issues are addressed in the papers.
23 I know the first one that Ms. Visconti raised was
24 Dr. Gannon. You know, his report, he had used the original
25 slides, which again had not been disclosed up to that

1 PROCEEDINGS 26

2 point. But, anyway, he had used those original slides.

3 The motion practice that came out of that, as you

4 know, Judge, was whether -- it wasn't -- there's no dispute

5 whether we should all be working off of the same slides; the

6 was the dispute as to plaintiff wanted to send them,

7 Mr. Rouviere wanted to send them right to our expert, who

8 hadn't even been disclosed yet. He refused to send them to

9 our office. And that was all that was about. So this

10 whole notion that, oh, we should have said something about

11 recuts since. The recuts weren't even in the case. The

12 recuts are duplicates. And those slides that Dr. Gannon

13 reviewed, photographed, referred to specifically, those

14 were the slides in the case, which again had not been

15 disclosed.

16 And so the second thing that Ms. Visconti said as
17 far as there's all these discovery requests that would have
18 encompassed these slides -- and I'm not seeing them, and
19 I've been through their discovery requests in preparation
20 for this motion, and I still don't see them. And I never
21 thought I -- [indiscernible] -- but am I missing something?
22 And they said no. If you want pathology specimens, you ask
23 for pathology specimens. There are a bunch of vague,
24 overbroad requests, most of them that say, you know -- that
25 end with if -- you know, that you intend to use at trial;

1 PROCEEDINGS 27

2 but other ones that are just vague and overbroad that would

3 require us not just to produce slides but to reproduce

4 every single, you know, medical record regarding any of the

5 surgeries. And we objected to those at the time, and that

6 is just overbroad. I don't know of any document requests

7 that -- valid document requests that would encompass these

8 slides.

9 And so that leaves us with the Rule 26
10 disclosures. And, again, those disclosures are, you know,
11 it's not -- you don't disclose every single thing that may
12 be relevant. It's that you may use in support of your
13 claims or defenses. And I won't repeat myself too many
14 times, but that was something that obviously had not
15 been -- had not been considered. So there's that. I
16 don't --

17 THE COURT: Let me ask you this. And, again, I'm
18 using ellipses here -- but there is a document request that
19 asks for any materials that evidence or document
20 plaintiff's hip surgeries. Doesn't that encompass the
21 recuts?

22 MR. ASFENDIS: That's the one that I was referring
23 to as wildly -- vague and wildly overbroad. Could it? I
24 suppose. But it could encompass a lot of things that are
25 not intended by it. It could encompass -- it would

1 PROCEEDINGS

28

2 encompass all -- we would have to reproduce all of her
3 records. What I suspect and what I think is not
4 unreasonable is that that request was not asking for -- was
5 probably asking for records that we would have had through
6 our sales representatives who were at the surgery. That's
7 just my speculation, but reading that request, you know,
8 "would evidence the surgeries," I -- reading that and
9 giving them the benefit of the doubt, it's still wildly
10 overbroad. And in some worlds could it encompass, you
11 know, pathology slides? Sure. And it could also encompass
12 a lot of other things that we wouldn't be required to be
13 reproducing or producing to plaintiffs. It just doesn't
14 make sense in that context to me. But that's the one that
15 I mentioned when I said that it was vague and overbroad.

16 THE COURT: Okay.

17 MR. ASFENDIS: As far as --

18 THE COURT: All right --

19 MR. ASFENDIS: Yeah, and I won't be too much
20 longer, but I do -- as far as the whole sanctions question,
21 again, there are some elements that have to be met. And
22 none of them are met, in my opinion. But obligation to
23 timely produce I don't think is there. Culpable state of
24 mind, so in other words, knew that we were doing something
25 wrong or violating rules, it's obviously not there. And

1 PROCEEDINGS

29

2 the, quote/unquote, "missing evidence would be relevant to
3 a party's claim or defense," and, again, that comes back to
4 this issue. These slides are duplicates, for all intents
5 and purposes.

6 There is nothing in this case that the plaintiffs
7 have put forth, other than really Ms. Visconti's lawyer's
8 arguments in the reply to say, well, you know, could slides
9 possibly be different; yeah, you know, it's possible. But
10 that's -- if you look at Dr. Nelson's declaration -- I'm
11 sure you have -- it's highly unlikely. Recuts are the
12 standard of care in the medical field. This is what
13 facilities rely on when -- you know, they don't send out
14 originals for clinical second review; they send out recuts.

15 And so in this case it's ironic but I think the
16 best evidence of the sameness of these -- the recuts to the
17 original is the defendants' own supplemental report. And,
18 again, you know, I know your Honor's aware of it, so I
19 won't repeat the point, but plaintiffs say that -- you
20 know, he just says in his letter responding to us that, you
21 know, basically, sorry about this unfortunate mix-up. I
22 don't know what that means. Plaintiffs' counsel says in
23 their reply that it's just illustrative, that the photos
24 are just illustrative. But it's more than just a mix-up.
25 He didn't just use the wrong photos; he claimed those

1 PROCEEDINGS

30

2 photos of original slides to be the recuts. And even more,
3 he didn't just attach them as illustrative; he actually
4 specifically referred to those photos of the originals and
5 pointed out specific characteristics in those photos of the
6 tissue to show his, quote/unquote, "new findings." And,
7 you know, if there's a question about any mix-up, he even
8 color-coded those photos to show exactly where on those
9 photos the major differences were. And the whole time he
10 was using the same slides from the first report. So it is
11 completely a bogus report. This is more than just a mix-
12 up. You know, the biggest piece of evidence, the biggest
13 difference, significant difference to him was this one
14 photograph of all this, you know, large titanium debris.
15 And he used the photo of the original slides to show that
16 new, quote/unquote, "new" metal titanium debris. But it
17 was always there. That was -- that photo was from his
18 original report.

19 So I don't want -- I don't think we should get
20 lost, lose the big picture out of this. All of this is
21 complete nonsense. And plaintiffs' other experts, they
22 don't even respond or address the concerns about the other
23 experts in their reply. These experts knew about these
24 issues. They say that they would have done something
25 different, and they wouldn't have. They were all aware.

1 PROCEEDINGS

31

2 And I'm not going to, you know, repeat the substantive
3 arguments, but I will point out that those were not
4 addressed on the reply. And I think that's -- that is
5 significant.

6 And, you know, I'll end it there, but if you have
7 any specific questions in addition to what you've already
8 asked, but this is not a case where discovery should be
9 reopened in any way. And there's certainly no basis for a
10 sanction award. So thank you for the time.

11 THE COURT: All right, lastly, again, I am not
12 soliciting but want to give an opportunity for Depuy's
13 counsel to emphasize any points that they wish to
14 emphasize.

15 MR. LARSON: Thank you, your Honor. This is J.T.
16 I will be very brief. I just wanted to say plaintiffs'
17 motion -- and Ms. Visconti just went over this -- there are
18 four distinct forms of relief that they're requesting.
19 They want to serve a supplemental pathology report from
20 Dr. Gannon; they want to possibly change unspecified
21 deposition testimony from the pathology of Dr. Gannon; and
22 then what I want to focus on, they want to serve a
23 supplemental report from a disqualifed expert who's been
24 disqualifed for conflicts of interest in this case and/or
25 from Dr. Jerrell. And that's the point that I want to

1 PROCEEDINGS

32

2 focus on just here at the end because it hasn't been
3 addressed in this.

4 Plaintiffs have to show good cause, your Honor,
5 for each form of relief that they're requesting in this
6 motion. They've kind of taken this broad, sweeping
7 proposition that if they can show good cause for anything,
8 then each expert should be able to opine again on how this
9 changes their opinions. And that's just simply not how
10 Rule 16 works.

11 I'm not going to address everything; that's been
12 done in our papers, your Honor. But I would just like to
13 briefly address the engineering. Plaintiffs brush over
14 this point. As Mr. Asfendis just said, they don't really
15 address it in their reply. Ms. Visconti barely mentioned
16 it today at oral argument. But we all understand what's
17 going on here with the pretext and the desire to redo
18 expert engineering opinions as it relates to Depuy and
19 failure to warn. For the last six months plaintiffs have
20 been trying to reopen expert discovery and fix what they
21 perceive as an error and give failure-to-warn opinions as
22 they relate to Depuy. To do that here, based on this new,
23 these discovered recuts, the disqualified expert and
24 Dr. Jerrell have simply just said, yeah, my opinions would
25 have been different had I seen this supplemental report.

1 PROCEEDINGS

33

2 That is unsupportable for at least two reasons that we
3 address in the papers and I'll just briefly state here.
4 The disqualified expert and Dr. Jerrell did not review
5 Dr. Gannon's original report. It is simply disingenuous to
6 say that if opinions had been slightly different in the
7 pathologist's report, my opinions would have been different
8 when you didn't review the pathologist's original report.
9 And, second, nothing in Dr. Gannon's supplemental report
10 would have affected the disqualified expert because she was
11 fully aware of these issues. We've shown this in our
12 opposition brief, your Honor, which thank you for allowing
13 us to submit that one -- it was overlong. But we've
14 addressed this at great length. The disqualified expert
15 was fully aware of the component impingement that took
16 place between the titanium stem and the cobalt chromium
17 shell, and he took pictures of the component impingements,
18 he stated in his brief that it was, quote, "very clear."
19 He measured the gouge in the titanium stem itself. He knew
20 it was titanium alloy. He knew the -- he measured the
21 gouge and the volume of debris that was released. It is
22 not believable that anything in the supplemental report
23 would have changed his opinions.

24 And, finally, your Honor, we respectfully request
25 that you look at this in light of the previous arguments

1 PROCEEDINGS

34

2 that plaintiffs have made to you over the last six months.
3 At first plaintiffs told you that the disqualified expert
4 actually did give opinions raised for failure to warn
5 related to Depuy. When that was rejected, plaintiffs told
6 the Court that the disqualified expert only failed, you
7 know, to give failure-to-warn opinions because he was
8 secretly conflicted by Depuy. And now the plaintiffs right
9 now are reversing all of this and telling you that they've
10 been continuing to work with the disqualified expert behind
11 the scenes and now he can be trusted when he says his
12 opinions would have been different and he would have given
13 probably -- they haven't given us the supplemental report
14 yet -- but presumably, we all expect that it will contain
15 failure-to-warn opinions against Depuy.

16 This is not good-faith litigation; this is
17 plaintiffs trying to undo expert discovery because they
18 believe that Depuy is about to prevail on summary judgment.
19 And our motion's been pending for several months. The
20 aggressive tactics that plaintiffs have displayed in this
21 lawsuit reached new heights last week when the Rouvieres
22 informed us that they intend to file a lawsuit against our
23 firms, against Howmedica and against the Gibbons paralegal
24 that you mentioned earlier. Plaintiffs don't address any
25 of the engineering expert issues in their reply. We

1 PROCEEDINGS

35

2 anticipate and -- but they apparently don't want to waive
3 them, either. The rest of it's in the papers, your Honor,
4 but I just wanted to make sure that I made that clear
5 during oral argument. Thank you.

6 THE COURT: All right. So I thank everyone for
7 the submissions, the argument. I will issue a written
8 opinion and order if not this evening then tomorrow. I
9 thank everyone for their time. And this matter is
10 adjourned. Thank you.

11 MS. VISCONTI: Your Honor, if I may? This is --
12 hello?

13 THE COURT: Is that you, Ms. Visconti?

14 MS. VISCONTI: Yes. But I don't know if everybody
15 else just left the line.

16 THE COURT: Yes. Hold on. Do we have Howmedica's
17 counsel on the line?

18 MR. ASFENDIS: Yes, I'm still here.

19 THE COURT: Do we have Depuy's counsel on the
20 line?:

21 MR. LARSON: I'm still here.

22 THE COURT: Okay. Very, very briefly,
23 Ms. Visconti. Go ahead.

24 MS. VISCONTI: Thank you. I just want to say
25 that, as I said in my papers, I really don't appreciate

1 PROCEEDINGS

36

2 the -- I don't think it's necessary to have the personal
3 attacks against Ms. Visconti asking to do all these things.
4 So I want to make it clear we are not asking to reopen all
5 of the expert discovery. What we're asking for is very
6 clear in our papers. We just want to be able to submit
7 this opinion, and we think that sanctions are warranted. I
8 don't know why there was a whole argument about the other
9 pending motions; I'm not going to address that. But,
10 again, just so that it's clear, we're not asking to reopen
11 all of the expert discovery in this case; we're just asking
12 if we can use Dr. Gannon's report and let everybody else
13 rely on it without objection. And, yes, absolutely,
14 sanctions are warranted in this case. That's it. Thank
15 you very much, your Honor. I appreciate the time.

16 THE COURT: All right. All right, thank you.

17 This matter is adjourned.

18 (Whereupon, the matter is adjourned.)

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3 C E R T I F I C A T E

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5 I, Carole Ludwig, certify that the foregoing
6 transcript of proceedings in the case of Rouviere et al v.
7 Depuy Orthopaedics, Inc. et al, Docket #18-cv-04814-LJL-
8 SDA, was prepared using digital transcription software and
9 is a true and accurate record of the proceedings.

10

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Carole Ludwig

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Signature _____

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Carole Ludwig

Date: May 5, 2021

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